Supreme Court, U.S.
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No. 95-788

In The

Supreme Court of the United States

October Term, 1995

MARY DOE, preborn child in being as a human embryo, on behalf of herself and all others similarly situated, *et al.*,

Petitioners,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY TO GOVERNMENT'S ARGUMENT

The **fundamental question** presented by Mary Doe's Petition for Certiorari is whether she, as a human embryo *in vitro*, separate and apart from the mother, has sufficient capacity and standing to be heard in federal court, upon the appointment of an appropriate guardian *ad litem* under Fed. R. Civ. P. 17(c). The Government, however, restricts its discussion of this most fundamental of questions to a single sentence at the bottom of a footnote (Br. Opp. 11 n.6). Instead, the Government, in an attempt to downplay and trivialize this case, baldly asserts that the only issue presented for review is one of mootness. As will be shown below, the Government's arguments that this matter is now moot are unavailing and do not prevent this Court from granting the Petition in order to decide the fundamental question of Mary Doe's capacity and standing.

The Government argues that "[i]t is obviously beyond the power of a court to enjoin the release and consideration of a report that has already been released and considered" (Br. Opp. 7). It is not beyond the power of this Court, however, to enjoin any and all *further and future* consideration of the Panel Report and any and all *future use* of that report to support any decision by the Government to engage in the federal funding of human embryo research. As the Government admits, while President Clinton directed NIH not to allocate federal monies to fund "the creation [conception] of human embryos for research purposes" (Pet. App. 102a), "[t]he Panel's other recommendations remain under consideration" (Br. Opp. 5).[1] So long as the Panel's remaining recommendations remain under active consideration

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1. This statement by the President, released to the press, was never reduced to an executive order, and in any event does not apply to Mary Doe and her tens of thousands of brothers and sisters already in existence (having been conceived as test tube babies) which NIH wishes to make the subject of human embryo experimentation, vivisection and destruction.

by NIH, this matter is not moot, as a court order to enjoin further consideration and use of the Report would have significant consequential effect.

The Government refers to the original Labor/HHS/ Education Appropriations Bill, H.R. 2127, which passed the House of Representatives on August 3, 1995. Attached to that measure was a prohibition (§ 511) against the bringing into being, creation of, or experimentation on human embryos. When H.R. 2127 went to the Senate, however, the Senate Appropriations Committee deleted § 511 from the bill. The measure then went to conference.

On January 5, 1996, the House passed H.R. 1358, the Target Appropriations Amendments, which contained funding for NIH through September 1996. This interim measure did not contain any provision to prohibit human embryo research by the NIH or other government agencies.

On January 25, 1996, the House attached a provision barring funding for human embryo experimentation to an additional, *temporary,* appropriations bill, passed on an emergency basis to fund the government through March 15, 1996. On January 26, 1996, the measure passed the Senate with the prohibition against human embryo experimentation intact. The President signed the measure.

There has been no authorization bill introduced into Congress, however, that would *permanently* prohibit experimentation on human embryos by NIH and other government agencies.

While President Clinton did sign this temporary appropriations bill on January 26, 1996 (containing an interim prohibition against the use of federal funds for human embryo experimentation) it is unlikely that this conflict between the

Legislative and Executive branches of Government will be resolved without the intervention of the Court.

The Government further asserts that "preventing federal officials from using or citing a publicly available report would not prevent federal funding of human embryo research . . ., since the government is free to fund such research whether or not it may explicitly refer to the Report and its recommendations" (Br. Opp. 7). To date, however, the Government has shown no inclination or willingness to go forward with the federal funding of human embryo research in the absence of any report or recommendations as to the ethics of such a course. In convening the Panel, the Director of NIH acknowledged that, prior to considering any specific proposal for funding, NIH should address the moral and ethical issues raised by the use of human embryos in research. Indeed, the Government admits that, far from deciding to ignore the Panel Report in reaching any decision whether or not to fund research on human embryos, that report's "other recommendations remain under consideration" by NIH (Br. Opp. 5).

As for standing, the Government takes the position that Petitioner Mary Doe lacks standing because the harm she faces is not "concrete and immediate" or "likely" (Br. Opp. 10). It is undisputed, however, that the Government, in particular NIH, has received numerous applications for support of research involving human embryos in the wake of the enactment of the National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122. It is also undisputed that the Panel was convened by NIH to make a report and recommendations as to those areas of human embryo research that are acceptable for federal funding, that the Panel Report did in fact make recommendations in favor of a broad range of federally funded research on human embryos, that the Advisory Committee to the Director of NIH summarily approved that Report in its entirety, and that, with the sole exception of the President's

pronouncement, the recommendations of that Report remain under active consideration by NIH.

Thus, this case does not present the type of speculative, conjectural, and abstract injuries that have been held insufficient to confer standing. Rather, this case presents a real and immediate threat of death and injury to the 20,000 human embryos *ex utero* presently stored at laboratories across the country, including Petitioner Mary Doe. This case does not present a "speculative chain of events" that is "simply too attenuated to amount to injury in fact." *Public Citizen v. Department of Health & Human Services*, 795 F. Supp. 1212, 1214 (D.D.C. 1992). Rather, the record in this case clearly demonstrates that the Clinton Administration and the NIH are intent on reversing, and are about to reverse, the previous administration's policy with respect to the federal funding of research involving human embryos, that the Panel Report is a key element in bringing about this policy reversal, and that this reversal will result in identifiable and grievous destruction of existing human embryos *in vitro*.

Turning to the issue of justiciability, the Government contends that since "it would be impossible to accommodate every possible point of view regarding the funding of human embryo research" on a single federal advisory committee, and since the FACA "provides no basis" for choosing which viewpoints should be represented on a particular committee "in order to achieve a fair balance" (Br. Opp. 11-12), the Act's "fair balance" requirement is completely unenforceable. What they fail to see is that the committee ultimately only accommodates one point of view: perhaps the one that they prefer.

In essence, the Government argues that the fair balance requirement can only be construed one way, as requiring that each federal advisory committee represent every point of view imaginable on the issues or policies to be considered by that

committee. Such an unduly broad interpretation of the term "fairly balanced" would certainly render the requirement unmanageable and judicially unenforceable. *See, e.g., National Anti-Hunger Coalition v. Executive Committee on President's Private Sector Survey on Cost Control*, 557 F.2d 524, 528 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983) (recognizing that "[i]*nterpreted most broadly*, it would take far more than a mere 150 individuals to ensure that every point of view concerned with the financial administration of federal programs be represented" (emphasis added)). Indeed, Congress implicitly recognized the unworkability of such a standard "when it described 'balanced' in terms of 'the functions to be performed by the advisory committee.'" 557 F. Supp. at 528.

The Court "should act under the assumption that Congress intended its enactment [in this case, FACA's fair balance requirement] to have meaningful effect and must, accordingly, construe it so as to give it such effect." *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987); *accord National Bank of Elizabeth, New Jersey v. Smith*, 591 F.2d 223, 231 (3d Cir. 1979); *see also United States v. American Trucking Associations*, 310 U.S. 534, 543-44 (1940). At least two alternative interpretations of the FACA fair balance requirement are available that would give that requirement meaningful effect by making it judicially enforceable. First, "the appropriate inquiry in determining whether the Committee's membership satisfies the 'fairly balanced' standard . . . is 'whether the Committee's members "represent a fair balance of viewpoints *given the functions to be performed.*" '" *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d 419, 435 (D.C. Cir. 1989) (Edwards, J., concurring in part and dissenting in part) (quoting *National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control, supra*, 711 F.2d at 1074 (Judge Edwards's emphasis)). In other words, as "the legislative history makes clear, the 'fairly balanced' requirement was designed to ensure that persons or

groups *directly affected by the work of a particular advisory committee* would have *some* representation on the committee." *National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control, supra,* 711 F.2d at 1074 n.2 (emphasis added).

A second, even narrower, interpretation that would give meaningful bite to the FACA fair balance requirement would be to construe the requirement as prohibiting an agency from deliberately picking a federal advisory committee with members of an industry, group of institutions, or other special interest group that stands to benefit financially or otherwise from making a particular recommendation within the committee's mandate. Such an interpretation would carry out Congress's intent to avoid the appointment of advisory committees that are "biased toward one point of view or interest." S. Rep. No. 92-1098, 92d Cong., 2d Sess. 5 (1972).

To adopt the Government's position, that agency compliance with FACA's "fairly balanced" requirement is nonjusticiable would be to thwart one of the basic purposes of FACA, namely to "cure" the "specific ill" of the "wasteful expenditure of public funds for . . . biased proposals." *Public Citizen v. Department of Justice,* 491 U.S. 440, 453 (1989). To say that such judgments "are for the agency to make" (Br. Opp. 12), would be like saying that Congress intended to send the fox to guard the chicken coop.

Again, however, Mary Doe's Petition presents far more than just questions of mootness, standing, and justiciability. Despite the Government's too obvious display of diversionary tactics, the true nature of this case shines through. Does Mary Doe, a human embryo *in vitro,* a test tube baby if you will, have such a legally cognizable stake in her continued existence and viability to require a federal court to hear her plea? Can any form of

human life — no matter how nascent, tiny, or fragile — be left locked outside the courthouse door?

Our posterity[2] should not be left, abandoned and helpless, on the courthouse steps. The Court may and should grant Mary Doe's Petition to resolve these fundamental questions.

Respectfully submitted,

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2. *See* United States Constitution Preamble.

In the earliest unabridged edition to Daniel Webster's Dictionary available to the writer, the word "posterity" is defined as follows:

> 1. Descendants; children, children's children, indefinitely; the race that proceeds from a progenitor. The whole human race are the posterity of Adam
>
> 2. In a general sense, succeeding generations; opposed to ancestors
>
> > "To the unhappy that unjustly bleed, heaven gives posterity t' avenge the deed."
> >
> > [Alexander] Pope

Webster's Dictionary 1857 (Daniel Webster's entire work, unabridged) published by G. & C. Merriam, Springfield, Massachusetts.